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# Supreme Court of the United States

OCTOBER TERM, 1971

## No. 71-1503

DeSOTO, INC.,

*Petitioner,*

vs.

CATAPHOTE CORPORATION and PERMALINE MANUFACTURING CORPORATION OF AMERICA,

*Respondents.*

## BRIEF OF RESPONDENT PERMALINE MANUFACTURING CORPORATION OF AMERICA IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF THE CASE.

Permaline is a small Chicago manufacturer of highway striping compound. It had no patent on its only product when, in 1962, its President was approached by the President of Cataphote and told that Cataphote was about to have issued a patent which would cover the only product made by Permaline. (Tr. 480, 516, 517). Alexander, the

Permaline President, discussed the patent claims with a chemist familiar with the field, and concluded that he would be out of business if he did not take a license from Cataphote. Neither Alexander nor the President of Cataphote discussed the $650 in public sales that were, years later, to invalidate the patent. Alexander, a lawyer, had no particular scientific knowlede of his own, and concluded a license agreement which allowed his company to remain in business.

After the license agreement was executed DeSoto, a major corporation and a subsidiary of Sears, presented the California market with a product similar to the Permaline and Cataphote products. The product was developed within a few weeks, and a former Cataphote employee named Collins, who had scientific data relative to the Cataphote product, had gone to work for DeSoto during the developmental period of DeSoto's new product. Cataphote was, apparently, suspicious of infringement and more, and made demands that DeSoto disclose the formula of their product. DeSoto declined.

Permaline then demanded that suit be brought to protect the patent for which it held a license. That suit was eventually lost when it appeared that Cataphote had made $650 in sales during its developmental period which were held to be commercial in nature, and which preceded the date of the application by more than one year.

The District Court found, upon the testimony of both Alexander and the President of Cataphote, that the patent license agreement was made in good faith.

As to the claim of unlawful monopoly, evidence was developed before the District Court, upon cross-examination of the DeSoto witnesses, that highway paint and the thermo-

plastic striping compound were competing products; one is cheaper to buy and put down, and the other lasts longer and looks better, but they do compete. A DeSoto witness (a chemist who had become a patent attorney by the time the case was tried) testified as follows (Tr. 176):

> Q. "Would it be correct to say that the principal rival product for thermoplastic highway striping is highway paint?
>
> A. You mean at the time in 1962?
>
> Q. Yes, in 1962.
>
> A. Yes, I would say it probably was."

This is principal evidence of relevant market brought out in the DeSoto case. It was confirmed by evidence offered by Cataphote, and by the cross-examination of another DeSoto witness. There is no other evidence in the record on this point, and, we suggest, the District Judge should not be faulted for believing what both sides said was the truth.

## QUESTIONS PRESENTED.

The petitioner states the questions presented for review as though this case were decided on great legal issues; it was not; it was decided on the facts, by a District Judge who heard substantially no evidence indicating that wrongful conduct had occurred. It was a fact case, decided adversely to petitioner, in a bench trial, upon a record which clearly supports the findings made.

As to Permaline, which had no part in obtaining the Poole patent, the only question is; was the proof sufficient to show a conspiracy to violate 15 USC Sections 1 or 2. The District Judge and the Court of Appeals both held that the proof was *not* sufficient.

## ARGUMENT.

### I.

### THIS CASE REPRESENTS NO DEPARTURE FROM THE HOLDINGS OF THIS COURT IN THE WALKER PROCESS CASE.

This Court, in *Walker Process Equipment Co.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965), held that, in considering a monopoly claim arising out of a patent fraudulently obtained, "it would . . . be necessary to appraise 'the exclusionary power' of the illegal patent claim in terms of the relevant market for the product involved." The relevant market is, plainly, a question of fact. The District Judge was presented, upon cross-examination of DeSoto witnesses, with a relevant market which included more than one particular type of highway striping compound or substance. The type of striping sold by Permaline and Cataphote amounted to a very small part of a market, and did compete with paint and other substances having the same use. This evidence, coming from DeSoto in large part, could not be contradicted.

We do suggest, therefore, that this Court should not concern itself with a fact question decided adversely to DeSoto. There is no departure from precedent, and no real point of law is involved. The predicate to a *Walker Process* case is lacking.

### II.

### THIS CASE REPRESENTS NO DEPARTURE FROM THE HOLDINGS OF THIS COURT IN THE SINGER CASE.

DeSoto argues that this case conflicts with *U.S.* v. *Singer Mfg. Co.*, 374 U.S. 174 (1963). In *Singer* there was a com-

bination of the patent positions of three companies into the hands of Singer for the express purpose of keeping the Japanese zig zag sewing machines out of the American market. The patents themselves covered the entire relevant market, and were obtained by cooperation between the three companies, each acceding to the other to avoid non-issuance. Their cooperation was to the point of eliminating competition, and to creating a power center supplied with weapons sufficient to protect their own exclusive enjoyment of the American market.

This case involves a single patent obtained by Cataphote alone. Permaline obtained no patents, and contributed nothing to the Cataphote patent position, such as it was. There was no "entwining" of Cataphote and Permaline. The Court of Appeals called Cataphote "impotent" (450 F. 2d at 773, note 8), and, relative to DeSoto, Cataphote was impotent, and gained no power worthy of note from Permaline. There was no building of power by combination, as in the *Singer* case.

The petitioner quotes in full a letter from Alexander to the President of Cataphote which uses the phrase "harrowing competition". This phrase was inserted seven times into DeSoto's brief before the Court of Appeals, and it is apparently felt that its use will have some effect here. It is plain that the District Judge believed it proper for the holder of a license under a patent to ask the licensor to do something about infringement. The colorful language did not make it wrongful, and the facts did not support any inference that an anti-trust violation was committed or intended.

## CONCLUSION.

We submit that it is hardly unique that a District Judge would find facts adverse to one party to a bench trial. That is what happened here. Such an occurrence, however displeasing to DeSoto, is hardly the basis for the granting of a writ of certiorari. We therefore pray that the writ be denied.

Respectfully submitted,

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